

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN**

In re)	
)	Chapter 9
CITY OF DETROIT, MICHIGAN,)	
)	Case No. 13-53846
Debtor.)	
)	Hon. Steven W. Rhodes
)	
)	Expedited Consideration
)	Requested

**THE OBJECTORS' SUPPLEMENTAL MOTION TO ADMIT CERTAIN
DEPOSITION TESTIMONY OF CHARLES MOORE AND JAMES DOAK**

The Objectors¹ hereby move this court pursuant to Federal Rules of Civil Procedure 26 and 32(a), made applicable to this proceeding by Federal Rules of Bankruptcy Procedure 7026 and 7032, for entry of the proposed order attached hereto as Exhibit 1 admitting the deposition testimony identified in Exhibit 6-A and Exhibit 6-B² for purposes of the upcoming evidentiary hearing(s) relating to the *Motion of Debtor for Entry of an Order (I) Authorizing the Assumption of that Certain Forbearance and Optional Termination Agreement Pursuant to Section*

¹ This motion is joined by Syncora Capital Assurance Inc. and Syncora Guarantee Inc. ("Syncora"), Assured Guaranty Municipal Corp., The Michigan Council 25 of the American Federation of State, County & Municipal Employees, AFL-CIO and Sub-Chapter 98, City of Detroit Retirees, Ambac Assurance Corporation, National Public Finance Guarantee Corporation, Hypothekenbank Frankfurt AG, Hypothekenbank Frankfurt International S.A., and Erste Europäische Pfandbrief- und Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A. (collectively "EEPK"), the Police and Fire Retirement System of the City of Detroit and the General Retirement System of the City of Detroit, FMS Wertmanagement AöR, and Financial Guaranty Insurance Company.

² The deposition designations submitted by the undersigned objectors are contained in Exhibits 6-A and 6-B.

365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant to Rule 9019, and (III) Granting Related Relief, dated July 18, 2013 [Doc. No. 17] (the “Assumption Motion”) and the *Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364(C)(1), 364(C)(2), 364(E), 364(F), 503, 507(A)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay*, dated November 5, 2013 [Doc. No. 1520] (the “DIP Motion”). The Objectors submit this motion as an amendment to their *Motion to Admit Certain Deposition Testimony of Kevyn Orr and Kenneth Buckfire* [Doc. No. 954] (the “Motion to Admit”) in light of the consolidation of the hearings [Doc. No. 1864] with respect to the Assumption and DIP Motions and the additional deposition testimony that has been obtained since the Objectors’ Motion to Admit. In support thereof, the Objectors state as follows:

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

LEGAL STANDARD

2. Federal Rule of Civil Procedure 32(a)(1) provides that, “[a]t a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8).” FED. R. CIV. P. 32(a)(1).

3. Under Federal Rule of Civil Procedure 32(a)(3), “[a]n adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).” FED. R. CIV. P. 32(a)(3).

4. In the Sixth Circuit, a “managing agent” for purposes of Rule 32(a)(3) is any person who possesses the following authority and attributes:

- a. Acts with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with his principal’s affairs (as distinguished from a common employee, who does only what he is told to do; has no discretion about what he can or cannot do; and is responsible to an immediate superior who has control over his acts);
- b. Can be depended upon to carry out his principal’s directions to give testimony at the demand of a party engaged in litigation with his principals; and
- c. Can be expected to identify himself with the interests of his principal rather than those of the other party.

In re Air Crash at Lexington, Kentucky, August 27, 2006, 71 Fed. R. Serv. 3d 313, 2008 WL 2954971, at *4 (E.D. Ky. Jul. 30, 2008) (citing *Brandon v. Art Centre Hospital (Osteopathic)*, 366 F.2d 369, 372 (6th Cir. 1966)).

RELIEF REQUESTED AND BASIS FOR RELIEF

5. In this case, the Objectors are submitting the deposition testimony of Charles Moore and James Doak, both of whom qualify as managing agents for purposes of Rule 32(a)(3). The deposition testimony that the Objectors intend to submit is attached hereto as Exhibits 6-A and 6-B.

6. The deposition testimony of Charles Moore satisfies the standards of Federal Rule 32. First, Mr. Moore was represented at his deposition by Jones Day. Second, the Objectors intend to use Mr. Moore's deposition testimony to the extent it would be admissible under the Federal Rules of Evidence if Mr. Moore were present and testifying (*i.e.*, as party admissions under Federal Rule of Evidence 801(2)(d)). Third, Mr. Moore was one of the City's "managing agents" at the time of his deposition on December 4, 2013.

7. At the time of his deposition, Mr. Moore was a Senior Managing Director at Conway MacKenzie, Inc. (Declaration of Charles Moore in Support of the DIP Motion [Doc. No. 1520] ¶ 1.) Mr. Moore was acting as an operational restructuring advisor to the City (*Id.*) As the operational restructuring advisor, Moore worked to develop an extensive 10-year reinvestment plan to rebuild the City's infrastructure (*Id.* at ¶ 4.) He worked closely with multiple City departments to develop a detailed and comprehensive work plan to manage those departments' activities. (Ex. 6-C, Moore Dep. 17:5-19.)

8. Mr. Moore acts, as set out in *In re Air Crash*, “with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with [the City’s] affairs.” Accordingly, he qualifies as a managing agent for purposes of Federal Rule 32(a)(3).

9. The deposition testimony of James Doak also satisfies the standards of Federal Rule 32. First, Mr. Doak was represented at his deposition by Jones Day. Second, the Objectors intend to use Mr. Doak’s deposition testimony to the extent it would be admissible under the Federal Rules of Evidence if Mr. Doak were present and testifying (*i.e.*, as party admissions under Federal Rule of Evidence 801(2)(d)). Third, Mr. Doak was one of the City’s “managing agents” at the time of his deposition on December 5, 2013.

10. At that time, Mr. Doak was a managing director at Miller Buckfire & Co., LLC, which served as an investment banker to the City. (Declaration of James Doak in Support of the DIP Motion [Doc No. 1520], ¶ 1.) Mr. Doak was involved in all aspects of obtaining postpetition financing for the City, including soliciting proposals, engaging in dialogue with potential lenders, selecting the best proposal for the City’s needs, and negotiating the primary terms of the financing documents. (Doak Decl. ¶ 4.)

11. Accordingly, Mr. Doak qualifies as a managing agent under Federal Rule 32. To begin, Mr. Doak had the authority to exercise his judgment and

discretion to negotiate the best possible terms with the prospective lenders. *See In re Air Crash*, 2008 WL 2954971, at *4 (stating that a managing agent is a person who “is invested with general powers to exercise his judgment and discretion in dealing with his principal’s affairs”). In addition, Mr. Doak’s appearance at his deposition and the upcoming evidentiary hearing demonstrate that he satisfies the other two factors set out in *In re Air Crash* — namely, that he can (a) be depended upon to carry out the City’s direction to provide testimony and (b) be expected to identify himself with the interests of the City as opposed to the Objectors.

12. Finally, it should be noted that, in addition to the fact that the depositions of Messrs. Moore and Doak are independently admissible, granting this Motion will permit counsel to focus their cross-examinations on the most salient points, which will help to streamline the consolidated hearing on the Assumption Motion and DIP Motion.

13. In filing this motion, the Objectors reserve their right to designate additional deposition testimony based on the evidence introduced at the hearing, consistent with any Orders of the Court regarding post-hearing submissions.

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WHEREFORE, the Objectors request that this Court grant the relief requested in this motion and enter an order consistent with the proposed order attached as Exhibit 1.

Dated: December 11, 2013

Respectfully submitted,

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